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In The

Supreme Court of the United States

..... Term, 1955

No. .....

State of North Carolina,
The North Carolina Department of Agriculture,
The North Carolina State Highway and Public Works Commission,
The North Carolina Farm Bureau Federation, Inc., and the Farmers Cooperative Exchange,
Plaintiffs,

v.

United States of America,
The Interstate Commerce Commission,
Aberdeen and Rockfish Railroad Co., et al.,
Defendants.

JURISDICTIONAL STATEMENT

This is an appeal by the State of North Carolina and others from the final judgment of a special District Court of three judges for the Eastern District of North Carolina, convened in accordance with the provisions of 28 U.S.C. 2325, and 2284. The judgment of the District Court, dated February 11, 1955, denying the relief prayed for by the plaintiffs and dismissing the action has not been published in the official or unofficial reports. A copy of the opinion and judgment of the District Court is appended hereto.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(1) This is a proceeding by the State of North Carolina and others to set aside and enjoin the enforcement of, and compliance with, an order of the Interstate Commerce Commission authorizing and directing the defendant railroads to increase their rates and charges for the transportation of freight in intrastate commerce within the State of North Carolina, and to enjoin the defendant railroads from charging for such transportation rates in excess of those established for such service by the State of North Carolina. The proceeding was instituted in the District Court for the Eastern District of North Carolina pursuant to the provisions of 28 U.S.C. 1336, 2284, and 2321 through 2325.

(2) The judgment, the review of which is sought by this appeal, was entered by the District Court of three judges for the Eastern District of North Carolina on February 11, 1955, and notice of appeal was filed in the said District Court on March 11, 1955.

(3) Jurisdiction of this appeal is conferred upon this Court by the provisions of 28 U.S.C. 1253, 62 Stat. 926.

(4) The jurisdiction of the Court over this appeal is sustained by numerous cases, including the following:

King v. United States, 344 U. S. 254, 73 S. Ct. 259, 97 L. Ed. 301 (1952);

North Carolina v. United States, 325 U. S. 507, 65 S. Ct. 1260, 89 L. Ed. 1760 (1945);

United States v. Hancock Truck Lines, 324 U. S. 774, 65 S. Ct. 1003, 89 L. Ed. 1357 (1945);

Interstate Commerce Commission v. Hoboken Manufacturers Railroad Co., 320 U. S. 368, 64 S. Ct. 159, 88 L. Ed. 107 (1944), Rehear. den., 321 U. S. 801, 64 S. Ct. 516, 88 L. Ed. 1088 (1944).

QUESTIONS PRESENTED BY THIS APPEAL

1. Under what circumstances may the Interstate Commerce Commission fix rates to be charged by railroads for the transportation of freight in intrastate commerce?

2. Is there substantial evidence in the record, considered

as a whole, to support the finding by the Interstate Commerce Commission that the rates established by the State of North Carolina for the transportation of freight in intrastate commerce cause undue, unreasonable, or unjust discrimination against interstate or foreign commerce?

3. Is there substantial evidence in the record, considered as a whole, to support the finding by the Interstate Commerce Commission that the rates established by the State of North Carolina for the transportation of freight in intrastate commerce cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand?

4. May the Interstate Commerce Commission increase intrastate rates when no increase has been sought from the State, or in excess of the increase sought from the State?

STATEMENT OF THE CASE

(a) *Origin and History of the Case*

This case arises out of an investigation by the Interstate Commerce Commission under Section 13 (4) of the Interstate Commerce Act, pursuant to a petition by the defendant railroads requesting authority to charge for the transportation of freight in intrastate commerce within the State of North Carolina rates in excess of those established and fixed by the State.

The case has its origin in the proceeding before the Interstate Commerce Commission known as Ex Parte No. 175. In that proceeding a series of orders was issued authorizing increases by all the railroads throughout the United States in interstate freight rates only. In effect, this series of orders authorized first a 6% increase, and then an additional 9% increase in interstate rates. That proceeding did not deal with intrastate rates.

Following the 6% increase in interstate rates, the railroads, who are defendants here, applied to the North Carolina Utilities Commission for a like increase in intrastate rates to expire February 28, 1953, which was the expiration

date fixed by the Interstate Commerce Commission's orde for the interstate increase. The North Carolina Utilities Com mission granted this increase subject to certain exception dealing with specified commodities. No appeal from that orde was taken.

Before the expiration of the 6% interstate increase, th Interstate Commerce Commission issued its order extendin the 6% increase and granting a further increase of 9%, bot to expire February 28, 1954. Again, the railroads, who ar defendants here, sought authority from the North Carolin Utilities Commission to increase their intrastate rates i North Carolina by the additional 9% and to extend the 6% increase, both to expire February 28, 1954. The plaintiffs i this case appeared in opposition. On July 9, 1953, the Nort Carolina Commission issued its order granting the full 15% increase in intrastate rates except that no increase was au thorized in the rate on fertilizer and fertilizer materials, th increase on road aggregates was limited to 6%, and the in crease on asphalt was limited to 9% of the rates previousl in effect. All increases were to expire February 28, 1954.

From this order by the North Carolina Utilities Commissio the State appealed to the Superior Court of Wake County North Carolina. That court reversed the order of the Nort Carolina Commission for the reasons, in substance, that i was arbitrary, in excess of the Commission's statutory au thority, and unsupported by substantial evidence in view o the entire record. From that judgment the railroads appeale to the Supreme Court of North Carolina, where the appea was heard on November 2, 1954. The decision of the Suprem Court of North Carolina has not yet been announced.

While the above-mentioned appeal was pending in th Superior Court of Wake County, the Interstate Commerc Commission extended the interstate increases to Decembe 31, 1955, and the railroads then filed yet another petition wit the North Carolina Commission seeking an extension t December 31, 1955, of the intrastate order which was then o appeal to the state court. In this petition the railroads di not ask that any change be made with reference to the intra state rates then in effect. That is, the railroads then aske the North Carolina Commission to fix intrastate rates so a

to extend the 15% increase generally but exempt fertilizer and fertilizer materials from any increase, limit the increase on road aggregates to 6% and limit the increase on asphalt to 9% of the original rates. The present plaintiffs again appeared in opposition. Before this petition could be heard the above-mentioned judgment of the Superior Court of Wake County, North Carolina, was rendered. The North Carolina Commission again heard the matter at length and, in accordance with that judgment, denied any increase in the rates.

The railroads elected not to appeal to the courts of North Carolina from this order of the North Carolina Commission, and filed with the Interstate Commerce Commission on March 11, 1954, their petition requesting it to permit them to disregard the rates so fixed by the State and put into effect on intrastate freight in North Carolina the full 15% increase on all commodities, including fertilizer, road aggregates and asphalt. The present plaintiffs intervened in opposition. Following a hearing the Interstate Commerce Commission issued its order directing the defendant railroads to put into effect on or before January 28, 1955, the full 15% increase on all intrastate transportation of freight in North Carolina, except that on certain types of cinders the increase was limited to 12%. It is this order which the plaintiffs in this action seek to have set aside and enjoined.

(b) *Findings of the Interstate Commerce Commission*

The order of the Interstate Commerce Commission is based upon the following findings and conclusions:

"1. The conditions incident to the intrastate transportation of freight in North Carolina are not more favorable than those incident to the interstate transportation in North Carolina and in the adjoining States.

"2. The amounts and percentages by which interstate freight rates and charges between points in North Carolina and points in other states were increased, as authorized in Ex Parte No. 175, are just and reasonable.

"3. The present North Carolina intrastate rates and charges on freight traffic imposed by authority of the State are abnormally low, and traffic thereunder fails to produce its fair share of the earnings required to yield revenue sufficient to

enable the respondents, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and thereby accomplish the purpose of the Interstate Commerce Act, as set forth in the national transportation policy declared by the Congress, to develop and preserve a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense; the burden thus cast upon interstate commerce is undue in and to the extent that these intrastate rates and charges are less than they would be on the basis herein prescribed; and these intrastate rates and charges cause, and for the future will cause, undue, unreasonable, and unjust discrimination against interstate commerce.

"4. Except as to road aggregates, there is active competition between persons and localities engaged in interstate commerce moving to and from points in North Carolina, on the one hand, and persons and localities engaged in intrastate commerce in North Carolina, on the other hand; this competition extends throughout the State of North Carolina and to freight traffic generally; and the existing disparities between the current interstate and intrastate freight rates result in undue preference of and advantage to persons and localities in North Carolina in intrastate commerce and undue prejudice of and disadvantage to persons and localities in interstate or foreign commerce.

"5. The undue, unreasonable, and unjust discrimination, and the undue and unreasonable advantage, preference, and prejudice herein found to exist should be removed by applying to the North Carolina intrastate rates and charges the same respective increases as are, and for the future may be, maintained by the respondents on like interstate traffic between points in North Carolina and adjoining States under our authorization in Ex Parte No. 175, except that an increase of not exceeding 12 per cent may be applied to the North Carolina intrastate rates on cinders, coal; cinders, clay or shale (Haydite); cinders, slate; coal ashes and slag, expanded, in open-top cars.

"6. The establishment of increases in intrastate rates and

charges as prescribed in finding 5 will not result in unreasonably high rates or charges, nor in rates or charges that are unreasonable in relation to interstate rates or charges, and will increase the respondents' revenues by at least $1,300,000 annually.

"7. The increased revenues to the respondents which will result from the increased rates and charges as provided in finding 5 are required from intrastate traffic in North Carolina in order to enable the respondents to provide adequate and efficient railway transportation service."

(c) *Wherein the Record Fails to Support the Order of the Interstate Commerce Commission*

The appellants submit that there is no substantial evidence in the record, considered as a whole, to support findings 3, 4 (except as to the existence of competition), 5, 6, or 7. This being true, the order of the Interstate Commerce Commission is beyond its authority under Section 13 of the Interstate Commerce Act for there is no substantial evidence in the record, considered as a whole, to show that the rates fixed by the State of North Carolina cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in intrastate commerce on the one hand and persons and localities in interstate commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

The record contains no substantial evidence to show: (1) that the railroads operating in North Carolina, or any of them, are not now rendering adequate and efficient service; (2) that they need additional revenues to enable them to continue to render such service; (3) that the intrastate business of these railroads within North Carolina does not, under the rates prescribed by the State, produce its fair share of the revenues required for this purpose; or (4) that an increase in such rates will result in either (a) improved service, (b) lower interstate rates, or (c) any increase in the flow of interstate commerce.

There is no evidence whatever in this record to show what return these railroads, or any of them, now earn from intrastate freight service, or intrastate freight and passenger serv-

ice combined, upon the properties attributable to such services. There is no evidence in the record to show what the value of those properties is. There is no evidence in the record to show the total cost of carrying intrastate freight in North Carolina. There is no evidence in the record to show what profit the railroads, or any of them, are now making from intrastate freight service in North Carolina, and in the absence of such evidence there can be in this record no support for the Commission's finding that the North Carolina intrastate freight rates do not now produce their fair share of the revenue needs of the defendant railroads.

The only evidence in the record as to the cost of service was expressly limited by the railroads' witnesses to the wages for the train crew and the cost of fuel, materials, and supplies consumed in the actual running of the train. Each witness specificially disclaimed any knowledge of, or intent to testify about, any other costs of transportation or about the proper allocation of joint costs between interstate and intrastate traffic. In the absence of evidence as to joint costs there cannot possibly be a finding, supported by evidence, that the North Carolina intrastate traffic was not contributing its fair share of the revenue requirements of the railroads under the rates fixed by the State.

There is in the record evidence introduced by the railroads themselves, showing that North Carolina is more heavily industrialized than any of the other states they serve, that it is becoming increasingly industrialized, that the value of its agricultural products is far in excess of those of any other state served by them, and that this necessarily means more intrastate freight to be moved by these railroads in North Carolina than in any other state served by them. The greater volume of intrastate traffic over these railroads in North Carolina, as compared with other parts of their systems, leads inescapably to the conclusion that the cost per ton-mile of intrastate freight in North Carolina is lower than the cost per ton-mile on other portions of these railroads' systems.

There is nothing whatever in the record to show that the full cost of transporting freight in intrastate commerce in North Carolina is the same as the full cost of transporting freight on any of these railroads considered as a whole. On

the contrary, the Chief Accountant of the Southern Railway, concluded his entire testimony with this statement:

> "I think it would be foolish for me or any accountant to assume that it costs the same to move a ton of freight, interstate or intrastate, in North Carolina, as it does on the entire system."

The witnesses for the railroads testified that they did not know the investment properly attributable to intrastate freight service in North Carolina, or to intrastate freight and passenger service combined in North Carolina. The only witness purporting to have knowledge of the financial needs of and the returns earned by all of these railroads testified that he did not know the rate of return for each, all, or any group of these railroads from intrastate freight service in North Carolina or from North Carolina intrastate freight and passenger service combined. The Traffic Manager for the Seaboard Railroad testified that he could not tell whether the Seaboard's intrastate freight traffic in North Carolina is more or less profitable than its interstate traffic in North Carolina in proportion to the investment attributable to its service, or equally so. The Traffic Manager for the Atlantic Coast Line testified that he has no idea what the net revenues produced by the present North Carolina intrastate rate schedule are, and no idea what the rate of return earned by the Atlantic Coast Line from intrastate business in North Carolina is. He added, "Nor has anyone else."

Nowhere in the entire record is there the slightest suggestion that the service of any of these railroads is not adequate or efficient.

The record shows that these railroads as a group are now earning a fair return from their entire business on their entire investments, and that they do not require additional revenues, either to maintain adequate service or to attract necessary capital, either debt or equity capital. There is no suggestion in the record, or in the order of the Interstate Commerce Commission, that the increase in intrastate rates will or could lead to a reduction in interstate rates and thus to a lightening of the financial burden now resting on interstate shippers.

The Interstate Commerce Commission found that 87% of the total revenue from intrastate freight in North Carolina is received by four of these railroads: the Atlantic Coast Line, the Norfolk-Southern, the Seaboard, and the Southern. Notwithstanding increased wages, cost of materials and taxes since 1945, on which the petitioners rest their case, the record contains undisputed testimony and data showing for these four railroads the following results from 1945 to 1953:

Atlantic Coast Line. Its operating ratio has dropped nearly 3 points notwithstanding the fact that no other railroad of comparable size in the entire country had so large a maintenance ratio. Its net railway operating income has almost doubled. Its net income has more than doubled. Its earnings per share of common stock have more than doubled. Its dividend per share has been increased from $3.75 to $6. Its earned surplus is approximately $55,000,000 more than it was in 1945, and is more than double its capital stock.

Norfolk-Southern Railway. Its operating ratio has dropped over 4 points. Its net railway operating income has nearly doubled. Its net income is approximately 7 times as large. Its earnings per share have doubled. Its dividend per share has risen from $1 to $3.40. Its long term debt has been cut in half. Its capital stock outstanding has been increased by 56%. Its surplus has more than doubled.

Seaboard Air Line Railroad. Its operating ratio has dropped over 13 points. Its net railway operating income has more than doubled. Its net income has risen from a deficit of over $10,000,000 to a positive figure of nearly $21,000,000. Its earnings per share have gone from a deficit to $22.25 per share. Its dividends have gone from zero to $7.50 per share. It has retired or converted into common $15,000,000 of preferred stock. Its earned surplus has gone from a deficit of approximately $85,000,000 to a surplus of over $77,000,000.

Southern Railway. Its operating ratio was exceptionally good in 1945, but is more than 2 points better now. Its net railway operating income is up by approximately 60%. Its net income has more than doubled. Its earnings per share of common stock have more than doubled. Its dividend has been increased from $3 to $5 per share and it has split its

common stock, 2 for 1. Its earned surplus has been increased by approximately $92,000,000 and is substantially more than its capital stock.

When a railroad corporation, or a group of railroad corporations, under existing rates, enjoys the greatest prosperity in its history, pays all operating expenses, all taxes, all maintenance, all depreciation, all interest, redeems preferred stock, pays dividends on common stock from $5 to $6 per share, and adds each year to its earned surplus many millions of dollars, that railroad, or group of railroads, is not being deprived of a fair return on its investment by the existing rate schedule. *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 54 S. Ct. 658, 78 L. Ed. 1182 (1934).

There is no substantial evidence in the record to support the Commission's finding that the intrastate rates fixed by the State result in undue preference of and advantage to persons and localities in intrastate commerce and undue prejudice of and disadvantage to persons and localities in interstate or foreign commerce.

The witnesses for the railroads made it clear that they did not contend that the intrastate rates established by North Carolina were a barrier to the free flow of interstate commerce into or out of the State. Their sole contention was that a disparity existed between intrastate and interstate rates where the distances travelled were the same. This is not enough to sustain the order of the Interstate Commerce Commission. *Florida v. United States*, 282 U.S. 194, 51 S. Ct. 119, 75 L. Ed. 291 (1931).

Section 13 of the Interstate Commerce Act does not require uniformity between interstate and intrastate rates. The Act does not contemplate that the state commissions will be mere clerical bodies, automatically putting into effect in intrastate commerce such increases or decreases in rates as the Interstate Commerce Commission may find proper in interstate commerce. It is only when the intrastate rate causes an "undue or unreasonable advantage, preference, or prejudice" between persons or localities in intrastate commerce on the one hand, and those in interstate or foreign commerce on the other hand, that the Interstate Commerce Commission is authorized to act. The mere fact that the

interstate and intrastate traffic move on the same train, and give rise to the same operating expenses, is not sufficient to show such undue or unreasonable advantage, preference, or prejudice. *North Carolina v. United States,* 325 U.S. 507, 65 S. Ct. 1260, 89 L. Ed. 1760 (1945).

The record contains no evidence showing that the North Carolina intrastate freight rates prevent or hinder shippers in other states from reaching the North Carolina market in competition with North Carolina producers of like commodities. On the contrary, the testimony and exhibits of the traffic experts of the several railroads show conclusively that shipments from other states do reach the North Carolina market in tremendous volume. The Freight Traffic Managers of the Southern and the Seaboard testified that there is a great volume of goods flowing into North Carolina from other states in competition with North Carolina products, and that the railroads do not take the position that the North Carolina intrastate rates prevent such interstate movement, or make it impossible for the out-of-state producer to compete for the North Carolina market.

Exhibits introduced in evidence by the railroads show that in a test period selected by them nine times as many less-than-carload shipments reached North Carolina markets from out of the State as reached those markets from other North Carolina points. Other exhibits prepared and introduced by the railroads show all carload shipments of each commodity to North Carolina points from North Carolina shippers, and shipments of the same commodity from shippers outside the State during the same test period. Typical comparisons are as follows:

Asphalt—32 carloads from other states, 5 from North Carolina;

Brick—20 carloads from other states, 14 from North Carolina;

Paper bags—19 carloads from other states, 5 from North Carolina;

Furniture—62 carloads from other states, 6 from North Carolina;

Cigarette paper—10 carloads from other states, 7 from North Carolina;

Molasses—8 carloads from other states, 2 from North Carolina;

Poles—42 carloads from other states, 8 from North Carolina;

Canned goods—239 carloads from other states, 20 from North Carolina;

Cotton—550 carloads from other states, 103 from North Carolina;

Feed—480 carloads from other states, 259 from North Carolina;

Fertilizer—2,103 carloads from other states, 1,285 from North Carolina;

Lumber—481 carloads from other states, 101 from North Carolina.

These exhibits show conclusively that the out-of-state producer was quite successful in his efforts to compete for the North Carolina market while the rates fixed by the State were in effect. Thus, the evidence introduced by the railroads shows that the State's rate structure does not act as a barrier to the free flow of interstate commerce into or out of North Carolina. All that the railroads have shown is that before the Commission granted the Ex Parte No. 175 increases, the rates on interstate shipments and intrastate shipments for the same distances were the same; whereas now they are not the same. This is not sufficient to show either that the North Carolina rates do not produce their fair share of the revenue requirements of these railroads, or that they create any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and those in interstate or foreign commerce on the other hand.

It is, of course, conceivable that under the State's rate structure, or any other rate structure, an adjustment should be made in the rates on a particular commodity moving between certain localities in order to enable a producer in another state to reach the North Carolina market on more favorable terms. Such a showing with reference to a single commodity, however well established, falls far short of justification for a general intrastate freight increase such as the

Interstate Commerce Commission has ordered.

There is no substantial evidence in the record to support the Commission's finding number six that the increase in intrastate rates will increase the defendant railroads' revenues by $1,300,000 annually. Due to the relatively short distances involved, intrastate freight is far more likely to be diverted to trucks, especially shipper-owned trucks, than is interstate freight. The record shows there is ample reason to believe that to increase the intrastate freight rates will add very little to the net income of the railroads, or any of them, and may actually cause a reduction in their net income.

This does not, of course alter the fact that the increase in rates ordered by the Commission will severely injure the plaintiffs. If the railroads lose only fifteen per cent of their present volume of intrastate freight to the trucks as a result of this order, which the record shows is likely, they will derive no benefit from the increase, but the remaining eighty-five per cent of the shippers who cannot switch to trucks will still be paying the higher rates. Thus, the record shows the increase ordered by the Commission will severely injure the plaintiffs and will do the defendants little, if any, good.

With reference to fertilizer, the order of the Interstate Commerce Commission undertakes to supersede rates fixed by the State of North Carolina, as to which no complaint has been made to the North Carolina Utilities Commission. The record shows that, in their most recent petition to the North Carolina Commission, the railroads asked that Commission to permit them to continue to charge the identical rates on fertilizer which they were charging at the time of the order of the Interstate Commerce Commision. The plaintiffs respectively submit that the Interstate Commerce Commission should not require or permit an increase in an interstate rate before a complaint with reference to that rate has been presented to and acted upon by the duly constituted authorities of the State.

The Interstate Commerce Commission likewise ordered a greater increase in the rates on asphalt, sand, gravel, crushed stone and other road aggregates moving in intrastate commerce than the railroads requested the North Carolina Utilities Commission to establish in their petition filed with that

Commission on January 21, 1954.

It is respectfully submitted that this Commission should not, in any event, grant a greater rate increase than that which the railroads requested the State authorities to put into effect.

THE QUESTIONS PRESENTED REQUIRE PLENARY CONSIDERATION, WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT

The questions presented by this appeal require plenary consideration, with briefs on the merits and oral argument, for their resolution because:

(1) The questions presented are substantial in nature for the reason that they involve a conflict between the State of North Carolina and the Interstate Commerce Commission in the matter of fixing the rates to be charged by railroads for transporting freight in intrastate commerce within the State, and for the further reason that the additional rates which the Interstate Commerce Commision has undertaken to approve and order to be put into effect would increase the cost to the State and its people of the transportation of freight in intrastate commerce in North Carolina by at least $1,300,000 annually if the volume of such transportation by railroads remains unchanged.

(2) The Interstate Commerce Commission has, by its order, undertaken to set aside the rates fixed by the State of North Carolina for the transportation of freight by railroads in intrastate commerce within the State, and to prescribe for such service rates in excess of those permitted by the State. The appellants submit that the order is beyond the statutory authority of the Interstate Commerce Commission for the reason that the record before the Commission does not contain substantial evidence to sustain findings by the Commission that the rates so fixed by the State cause either (1) any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or (2) any undue, unreasonable, or unjust discrimination against interstate or foreign commerce. Plenary consideration of this appeal, with briefs on the merits and oral

argument, is necessary in order that the appellants may have an opportunity to show the Court wherein the record fails to support the findings and order of the Commission, and wherein the District Court erred in denying the prayer of the complaint and dismissing the action.

(3) This appeal involves the question of whether the Interstate Commerce Commission, upon a petition by railroads serving a state, may authorize those railroads to charge for intrastate transportation rates in excess of those fixed by the state when the railroads have not sought such an increase from the proper state authorities. The proper presentation of the position of the appellants on this question requires that the appellants be permitted to file briefs and present oral argument.

(4) The questions presented are substantial in nature in that they involve a conflict in decisions on the same matters between the special District Court of three judges for the Eastern District of North Carolina in this case and a special District Court for the Southern District of Mississippi in the case of *Mississippi Public Service Commission v. United States*, 124 F. Supp. 809 (S. D. Miss., Three-Judge Court, 1954).

THE OPINION OF THE DISTRICT COURT

There is appended hereto a copy of the opinion of the District Court. No other opinion, findings of fact or conclusions of law were entered by the District Court in this action.

THE JUDGMENT OF THE DISTRICT COURT

There is also appended hereto a copy of the judgment of the District Court from which this appeal is taken.

Respectfully submitted this the 29th day of April, 1955.

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OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

Civil Action No. 836

State of North Carolina, The North Carolina Department of Agriculture, The North Carolina State Highway and Public Works Commission, The North Carolina Farm Bureau Federation, Inc., and The Farmers Cooperative Exchange, Plaintiffs,

versus

United States of America, The Interstate Commerce Commission, Aberdeen & Rockfish Railroad Company, et al., Defendants.

On Application for Injunction.

Argued January 21, 1955. Decided February 11, 1955.

Before Parker, Circuit Judge, and Gilliam and Warlick, District Judges.

Harry McMullan, Attorney General of North Carolina, I. Beverly Lake and John Hill Paylor, Assistant Attorneys General, for State of North Carolina and North Carolina Department of Agriculture; R. Brookes Peters, Kenneth Wooten, J. Melville Broughton, Jr., and Robert B. Broughton, for North Carolina State Highway and Public Works Commission. Stanley N. Barnes, Assistant Attorney General, James E. Kilday and Willard R. Memler, Special Assistants to the Attorney General, and John T. Gaskill, United States Attorney, for the United States; Edward M. Reidy, General Counsel, and Leo H. Pou, Assistant General Counsel, for Interstate Commerce Commission.

Parker, Circuit Judge:

This is an action to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission entered under Section 13(4) of the Interstate Commerce Act, 49 USC 13(4),* granting an increase of intrastate freight rates on

*Section 13(3) of the Interstate Commerce Act, 49 USC 13(3), authorizes the Commission to conduct an investigation where state rates are brought in question before it upon petition of a carrier. Section 13(4), 49 USC 13(4), is as follows:

"Sec. 13, par. (4) *Duty of commission where State regulations result in discrimination.* Whenever in any such investigation the commis-

railroads in the State of North Carolina. A court of three judges has been constituted as required by statute, the case has been heard upon the record made before the Commission and the briefs and arguments of counsel, and has been submitted for final decree. The contention of plaintiffs is that the order of the Commission, finding undue discrimination against interstate commerce and against persons and localities engaged therein, is not supported by the record.

The facts are that within the State of North Carolina, a long and narrow state, which is crossed by the great railroads constituting the principal arteries of commerce in the southeastern section of the United States, there is not now and for many years has not been any distinction between the handling of freight in interstate and intrastate commerce, the bulk of both interstate and intrastate freight being handled by the interstate railway systems in the same way and with the same instrumentalities. If there has been any difference, it is that the cost with respect to intrastate freight is greater because the hauls are shorter. For thirty years or more parity between intrastate and interstate rates has been maintained.

In Ex Parte No. 175, the Commission in 1951 and 1952 gave consideration to requested increases in freight rates throughout the United States made necessary by rising prices and higher wage rates and entered orders granting increases of interstate rates, the increases in southern territory being first 2%, then 6% and finally 15%, except as to certain commodities with respect to which smaller increases were granted. See 280 I.C.C. 179, 281 I.C.C. 557, 284 I.C.C. 589, and 289

sion, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

I.C.C. 395. Following these increases, the North Carolin Utilities Commission granted first a 6% and then an additiona 9% increase in intrastate rates on all except a very limite number of commodities. Upon appeal to the Superior Cour however, this order of the Utilities Commission was vacate and set aside, and an appeal to the State Supreme Court wa taken and is still pending.

Before the decision of the Superior Court was rendered o the appeal from the Utilities Commission, the railroads file another petition with that Commission asking that the 15% increase in rates theretofore granted, which was to expire i February 1954, be extended to December 31, 1955. The cas in the Superior Court was decided, however, before the pe tition asking the extension of the order could be heard; and on the basis of that decision, the Utilities Commission denie the requested extension.

Upon the denial of this last petition by the Utilities Com mission, the railroads sought no further relief with respec to intrastate rates from that Commission or from the Stat courts, but filed a petition with the Interstate Commerc Commission asking relief under sections 13(3) and 13(4) o the Interstate Commerce Act on the ground that the intra state rates resulted in undue discrimination against inte state commerce and persons and localities engaged therei The Commission thereupon held a hearing lasting for fou days in which it heard a great volume of testimony and gav thorough consideration to freight rates within the state an filed a report and order granting, with certain minor excep tions, the increases necessary to restore the parity betwee intrastate and interstate rates.

The report of the Commission finds in detail the evidentiar facts upon which its ultimate findings are based, and there i no contention that this finding of evidentiary facts is no amply supported by the evidence in the case. It is not neces sary to repeat them here; but it is sufficient to say that the fully support the ultimate findings of the Commission whic are as follows:

> "1. The conditions incident to the intrastate transporta tion of freight in North Carolina are not more favorabl than those incident to the interstate transportation i North Carolina and in the adjoining states.

"2. The amounts and percentages by which interstate freight rates and charges between points in North Carolina and points in other States were increased, as authorized in Ex Parte No. 175, are just and reasonable.

"3. The present North Carolina intrastate rates and charges on freight traffic imposed by authority of the State are abnormally low, and traffic thereunder fails to produce its fair share of the earnings required to yield revenue sufficient to enable the respondents, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and thereby accomplish the purpose of the Interstate Commerce Act, as set forth in the national transportation policy declared by the Congress, to develop and preserve a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense; the burden thus cast upon interstate commerce is undue in and to the extent that these intrastate rates and charges are less than they would be in the basis herein prescribed; and these intrastate rates and charges cause, and for the future will cause, undue, unreasonable, and unjust discrimination against interstate commerce.

"4. Except as to road aggregates, there is active competition between persons and localities engaged in interstate commerce moving to and from points in North Carolina, on the one hand, and persons and localities engaged in intrastate commerce in North Carolina, on the other hand; this competition extends throughout the State of North Carolina and to freight traffic generally; and the existing disparities between the current interstate and intrastate freight rates result in undue preference of and advantage to persons and localities in North Carolina in intrastate commerce and undue prejudice of and disadvantage to persons and localities in interstate or foreign commerce.

"5. The undue, unreasonable, and unjust discrimination, and the undue, and unreasonable advantage, preference, and prejudice herein found to exist should be removed by applying to the North Carolina intrastate rates and charges the same respective increases as are, and for the future may be, maintained by the respondents on like interstate traffic between points in North Carolina and adjoining States under our authorization in Ex Parte No. 175, except that an increase of not exceeding 12 per-

cent may be applied to the North Carolina intrastate rates on cinders, coal; cinders, clay or shale (Haydite); cinders, slate; coal ashes and slag, expanded, in open-top cars.

"6. The establishment of increases in intrastate rates and charges as prescribed in finding 5 will not result in unreasonably high rates or charges, nor in rates or charges that are unreasonable in relation to interstate rates or charges, and will increase the respondents' revenues by at least $1,300,000 annually.

"7. The increased revenues to the respondents which will result from the increased rates and charges as provided in finding 5 are required from intrastate traffic in North Carolina in order to enable the respondents to provide adequate and efficient railway transportation service."

Upon these findings the Commission entered its order authorizing the railroads to put into effect a 15% increase in intrastate freight rates, except with respect to certain commodities as to which the increase was limited to 12%. The findings were in essence the same as those made by the Commission which were before the Supreme Court and were held sufficient to sustain the Commission's order in King v. United States 344 U. S. 254. In that case the Supreme Court distinguished the case of North Carolina v. United States 325 U. S. 507, upon which plaintiffs chiefly rely, on the ground that the order there was based upon the mere disparity between intrastate and interstate passenger rates and did not contain the essential findings that were made in the King case. As similar findings were made here and as they are unquestionably supported by the evidence, there would seem to be little need of further discussion. See also Louisiana Public Service Commission v. United States 125 F. Supp. 180, aff. 348 U. S. 885, and State of Tennessee v. United States 113 F. Supp. 634, aff. 346 U. S. 891.

Plaintiffs contend that there was no sufficient showing of discrimination against interstate commerce and in favor of intrastate commerce resulting from the intrastate rates. It appears, however, that, without the Ex Parte No. 175 increases on any of their traffic in 1953, the return on net

investment in 1953 for the four principal carriers receiving 87% of the intrastate revenue would have been 0.94% for the Norfolk Southern, 4.63% for the Seaboard, 4.35% for the Southern, and a deficit of more than $4,000,000 for the Atlantic Coast Line, or a combined return for the four roads of 2.84%. This is not a case, then, as plaintiffs argue, where an unnecessary increase was granted in a prosperous territory because of a need in other sections. The need for increase existed in North Carolina as these figures show, and the Commission estimated that the total loss from the non-application of the increase in 1953 was $1,500,000. As the cost of handling intrastate freight was shown to be as great as or greater than the handling of interstate freight, the raising of interstate rates without raising intrastate rates necessarily resulted in throwing an undue share of the cost of the service upon interstate transportation. As said by Mr. Justice Stone in Illinois Commerce Commission v. United States 292 U. S. 474, 485, "The effect of maintaining a lower rate, intrastate, than the reasonable interstate rate is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried on, as in the District, under substantially the same conditions."

In Wisconsin R. R. Com. v. C. B. & Q. R. R. Co. 257 U. S. 563, 586, Chief Justice Taft, speaking for the court, said:

> "If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay *a fair proportionate share* of the cost of maintaining an adequate railway system. * * * If *that purpose* is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' within the ordinary meaning of those words."

The Commission went further, however, and showed that if intrastate rates had been adjusted to include the full effect of the Ex Parte No. 175 increases, the total revenues for 1953 of the principal railroads, i.e., the N. & S., the S. A. L., the Southern and the Coast Line would have been

$509,787,029 and their North Carolina intrastate revenue $11,265,176, a ratio of 2.21%. This was contrasted with their freight revenue for the year 1947, the only post war year in which increases were granted simultaneously by the Interstate Commerce Commission and the North Carolina Commission. In that year the ratio was 2.264%. It thus appears that, even with the increases asked, the ratio of intrastate to interstate revenue would be less than in 1947.

We think it equally clear that the failure to increase intrastate rates in accordance with the increase of interstate rates resulted in undue preferences to persons and localities within the prohibition of the statute. This was pointed out by the Commission in its evidentiary fact finding, where for illustration the Commission referred to the discrimination against Richmond, Va., and in favor of Winston-Salem, N. C., on shipments to Goldsboro, N. C., or against Augusta, Ga., and in favor of Mt. Airy, N. C., on shipments to Asheville, N. C. Countless other illustrations of undue discrimination against out of state shipping points as a result of the disparity between interstate and intrastate rates will occur to anyone familiar with the movement of commerce within the state. This is dealt with at considerable length in the report of the Commission, which said at the end of a rather lengthy analysis:

> " * * * the record shows the movement of intrastate and interstate carload and less than carload shipments, made during a representative period to common North Carolina destinations, of a wide variety of commodities, including all of those moving in important volume, at both the class and the commodity rates here in issue and their counterpart in interstate commerce. When, as here, there is a substantial disparity between intrastate rates and reasonable interstate rates contemporaneously applied under substantially similar transportation conditions, coupled with a showing of competition between interstate and intrastate rates as indicated by actual shipments which moved to common destinations under the intrastate and interstate rates, there arises the unjust discrimination against interstate commerce and the undue prejudice to persons or localities in interstate commerce which the act declares to be unlawful. The single exception to the foregoing are the rates on road aggregates, as to which, for the reasons above set out, the record is

inadequate to support a finding of undue prejudice and preference as between persons or localities. However, this does not preclude a finding of unjust discrimination against interstate commerce with respect to the rates on road aggregates, for the evidence is clear that the intrastate traffic in these commodities is not bearing its just proportion of the total transportation burden."

Plaintiffs complain because the Commission made no separate valuation of the property engaged in intrastate as distinguished from interstate commerce; but we agree with the Commission that it was not practicable and that it would serve no useful purpose for this to be done. As said by the Commission in its report:

"We have found in numerous proceedings of this character that a reasonably accurate separation of values, operating revenues, and expenses as between interstate and intrastate operations appears to be impracticable. In Wyoming Intrastate Freight Rates and Charges, 287 I.C.C. 743 (February 2, 1953), we said, at page 755: 'The proportionate percentage of each individual class of traffic moving intrastate and interstate is not shown. Nevertheless, where, as is the case here, the intrastate and the interstate traffic, as a whole, moves under substantially similar conditions, and the expense of handling the two classes of traffic is inextricably woven together, any attempt to do the impracticable, namely, to show separately the costs of the intrastate and the interstate service would serve no useful purpose. See Florida v. United States, 292 U. S. 1, 9: Illinois Commerce Comm. v. United States, 292 U.S. 474; North Carolina v. United States, 325 U.S. 507; King v. United States, 344 U.S. 254'."

In Illinois Commerce Commission v. United States 292 U. S. 474, 483-4, the Supreme Court said:

"Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues."

While there is allegation in the complaint and some argu-

ment to the effect that the Commission was without jurisdiction to order increase of intrastate rates until remedies under state law had been exhausted, we do not understand that point to be seriously insisted on. Certainly it is without merit. The Commission in discharging the duties imposed upon it by Congress may not be delayed by proceedings before state courts or commissions. As said by the Supreme Court in Florida v. United States 282 U. S. 194, 210, "To hold, as some of the appellants urge, that there can be no adjustment of intrastate rates by the Interstate Commerce Commission so far as may be needed to protect interstate commerce until the State itself has first 'sat in judgment on the issue of the lawfulness of those intrastate rates' would be to impose a limitation not required by the terms of the statute and repugnant to the grant of authority." Squarely in point is the decision in State of Illinonis v. United States 101 F. Supp. 36, 47, where the special statutory court of three judges, speaking through Judge Perry, said:

> "The pendency of a suit in the local courts of the State of Illinois to set aside a report and order of the Illinois Commerce Commission which refused to permit the Illinois Central Railroad Company to make any changes or increases in its presently existing suburban fares in the Chicago area did not in any manner affect the power or jurisdiction of the Interstate Commerce Commission under section 13(3) and (4) of the Interstate Commerce Act; and it was within the power of the Interstate Commerce Commission, and it was its duty, having found upon substantial evidence the existence of an unjust discrimination against interstate commerce, caused by the suburban fares in question which had been made and imposed under authority of the State of Illinois, to prescribe the rate or fare to be charged in the future in order to remove such unjust discrimination."

For the reasons stated the petition to set aside and enjoin the enforcement of the order of the Commission will be denied and the action will be dismissed.

Petition Denied and Action Dismissed.

JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

Civil Action No. 836

State of North Carolina, The North Carolina Department of Agriculture, The North Carolina Highway and Public Works Commission, The North Carolina Farm Bureau Federation, Inc., and the Farmers Cooperative Exchange, Plaintiffs,

versus

United States of America, The Interstate Commerce Commission, Aberdeen & Rockfish Railroad Co., et al., Defendants.

This cause coming on to be heard before the undersigned constituting a special District Court of three judges, convened in accordance with statute; and being heard upon the pleadings, the record made before the Interstate Commerce Commission and the briefs and arguments of counsel; and being submitted by all parties for final decree:

The Court finds the facts to be as set forth in the Report of the Interstate Commerce Commission, and being of opinion, for the reasons set forth in the written opinion filed herewith, that the plaintiffs are not entitled to the relief prayed and that the action should be dismissed:

Now therefore, it is ordered that the prayer of the complaint be denied and that the action be dismissed, and that the costs hereof be taxed against plaintiffs.

This the 11th day of February 1955.

/s/ John J. Parker
Chief Judge, Fourth Circuit.

/s/ Don Gilliam
U. S. District Judge, Eastern District of North Carolina.

/s/ Wilson Warlick
U. S. District Judge, Western District of North Carolina.